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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE STATE OF TEXAS,

Petitioner

vs.

RONALD CURTIS CHAMBERS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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3-1-4

QUESTIONS PRESENTED

I.

Should this Court's decision in *Estelle v. Smith,* 451 U.S. 454, be retroactively applied to overturn convictions final before the date of that decision?

II.

Did the Texas Court of Criminal Appeals correctly apply this Court's decision in *Estelle v. Smith,* 451 U.S. 454, to reverse a conviction in which a psychiatrist testified in the punishment phase of trial based on a pre-trial psychiatric examination which Respondent participated in voluntarily after being warned by his counsel to remain silent?

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No._____

IN THE

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OCTOBER TERM, 1984

THE STATE OF TEXAS,

Petitioner

vs.

RONALD CURTIS CHAMBERS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

The petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas entered in this proceeding on December 5, 1984. The State's motion for rehearing was denied on March 27, 1985.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, not yet reported, appears in the Appendix as *Ex parte Ronald Curtis Chambers,* No. 69,260. No opinion was rendered by the Court upon its denial of the State's motion for rehearing. A copy of the denial appears in the Appendix.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals setting aside Respondent's capital murder conviction was entered on December 5, 1984. The State's timely motion for rehearing was denied on March 27, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Ten years ago Ronald Curtis Chambers kidnapped and robbed two college students, brutally murdering one and attempting to murder the other. At Chambers' trial in July of 1975, the survivor testified against him and the State presented physical evidence further linking him to the crime. He was found guilty of capital murder. At the punishment phase of the bifurcated proceeding the State presented testimony of a psychiatrist who had examined Chambers prior to the trial. The psychiatrist testified that Chambers would be dangerous in the future. The jury sentenced Chambers to death.

Following Chambers' direct appeal, *Chambers v. State,* 568 S.W.2d 313 (Tex. Crim. App. 1978), denial of petition for writ of certiorari, 440 U.S. 928, 99 S.Ct. 1264, 59 L.Ed.2d 584 (1979), and two futile habeas attacks, the first denied without written opinion on October 17, 1979 (Tex. Crim. App. No. 7929), and the second denied in *Ex parte Chambers,* 612 S.W.2d 572 (Tex. Crim. App. 1981), the United States Supreme Court decided *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) on May 18, 1981.

Applicant filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas, Cause No. CA3-81-1953-R. On May 25, 1983 the petition was dismissed without prejudice for failure to exhaust state remedies.

On February 29, 1984, Chambers filed another application for writ of habeas corpus. In this application he alleged for the first time in State court that the requirements of *Estelle v. Smith* had not been met in his case. In its response to the application, the State argued procedural default (failure to object at trial to the psychiatrist's testimony on any constitutional ground), waiver of Fifth or Sixth Amendment privileges (Chambers was specifically

warned by his counsel prior to the psychiatric examination not to talk to any psychiatrists because his statements could be used against him at the punishment phase of the trial), and that *Solem v. Stumes* 465 U.S. ..... , 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) required that *Smith* not be applied retroactively.

The trial court ruled that there was no trial objection and, alternatively, that *Smith* should not be applied retroactively. It thus recommended that relief be denied.

The Court of Criminal Appeals rejected this recommendation of the trial court and ordered a hearing to develop facts relevant to the *Smith* issues. Appendix, p. A-3.

At the fact finding hearing Chambers' attorneys testified that they had known he would be examined by a psychiatrist, probably Dr. Grigson, and that they had warned Chambers specifically not to talk to any psychiatrists, telling him that the interview would be used by the State at the punishment phase of his capital murder trial in order to convince the jury to assess the death penalty. The trial court again filed findings of fact and conclusions of law that Chambers had been warned and that he had waived his rights. Appendix, p. A-17.

The Court of Criminal Appeals granted relief. It reiterated that it would apply *Smith* retroactively and held that the warnings in the form of advice of counsel did not satisfy the requirement of *Smith*. Appendix, p. A-3.

The State filed a motion for rehearing urging the Court of Criminal Appeals to address its argument that *Smith* not be applied retroactively in light of the recent *Stumes* decision. This motion was denied without written opinion.

The State seeks review of the decision of the Court of Criminal Appeals applying *Smith* retroactively and incorrectly.

REASONS FOR GRANTING THE WRIT

I.

This Court has never decided whether *Estelle v. Smith* should be prospectively or retroactively applied. The decision of this Court in *Solem v. Stumes* compels only prospective application of *Estelle v. Smith*. The action of the Texas Court of Criminal Appeals applying *Estelle v. Smith* retroactively is erroneous and should be reviewed.

Petitioner believes that the decision of this Court in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), should not, in light of this Court's decision in *Solem v. Stumes*, 465 U.S. ..... , 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) be applied retroactively to cases in which a conviction is being collaterally attacked. In *Stumes* it was held that this Court's decision in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) should not be applied retroactively. *Edwards* held that once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him since an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. In *Smith*, another Fifth Amendment decision, the Court held that where a defendant was not advised before a pre-trial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at the sentencing proceeding, the admission of the psychiatrist's testimony at that proceeding violated the defendant's Fifth Amendment privilege against compelled self-incrimination. The Court further held that admission of the psychiatrist's testimony violated the defendant's Sixth Amendment right to the assistance of counsel in deciding whether to submit to the examination and to what end the psychiatrist's findings could be employed. The *Edwards* and *Smith* decisions thus implicate similar constitutional rights.

The analysis of this Court in *Stumes* should be used to determine whether *Smith* is retroactive. *Stumes* held that the criteria guiding resolution of whether a new constitutional decision should be applied retroactively are 1) the purpose to be served by the new standards, 2) the extent law enforcement authorities relied on the old standards, and 3) the effect on the administration of justice of a retroactive application of the new standards. The *Stumes* analysis, when applied to *Smith*, compels non-retroactive application with even greater force than in *Edwards*. The Texas Court of Criminal Appeals has refused to address these issues.

Purpose of new standard

"Complete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Stumes* 104 S.Ct. at 1342. In *Stumes* the Court noted that the "*Edwards* rule has only a tangential relation to truth finding at the trial." The request for a lawyer by an accused does not mean that his subsequent statements are likely to be inaccurate.

Similarly, the fact that an accused was not warned by the examining psychiatrist that his statements might be used to prove future dangerousness does not make those statements any less accurate.

Miranda itself was not applied retroactively to trials taking place before it was decided. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 2602, 16 L.Ed.2d 694 (1966). *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). Whether a constitutional rule of criminal procedure enhances the reliability of the fact finding process at trial is a matter of degree. In *Stumes* and *Johnson* it was noted that pre-Miranda law would still protect an accused from being convicted by use of coerced confessions. The same should be true in coerced statements made to a psychiatrist.

Miranda can be no less important to enhancing accuracy than *Smith*, and *Miranda* is not retroactive. Since *Smith* flows from *Miranda* it can also be regarded as "a prophylactic rule, designed to implement pre-existing rights" and should not be applied retroactively. *Stumes* 104 S.Ct. at 1343. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

Extent of reliance

In *Stumes* it was held that *Edwards* "established a bright-line rule to safeguard pre-existing rights, not a new substantive requirement" in that *Edwards* "did not overrule any prior decision or transform standard practice." Nevertheless, sufficient reliance was found to "consider the reliance interest compelling".

Similar analysis reveals that *Smith* was at least such a "newish"[1] decision. Prior to *Smith* it was accepted that punishment phase psychiatric testimony offering no threat of disclosure of prosecutable crimes involved no compelled testimonial self-incrimination. *Pollis v. Smith*, 572 F.2d 685, 690-691 (2d Cir. 1978); *Livingston v. State*, 542 S.W.2d 660 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977). It had also been held that the Miranda requirement of specific warnings did not apply outside the context of "the inherently coercive custodial interrogations for which it was designed." *Roberts v. United States*, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980). Authorities justifiably relied on these and other cases and state statutes to allow punishment phase psychiatric testimony. *See Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); and TEX.

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[1] *Shea v. Louisiana*, 470 U.S. ..... , 106 S.Ct. ..... , 84 L.Ed.2d 38 (February 20, 1985), Justice White, dissenting at 84 L.Ed.2d 38, 51. *Shea* held *Edwards* applicable only to cases on direct appeal at the time *Edwards* was decided. Justice White coined the distinction between "not new, newish and brand new" categories of decisions.

CODE CRIM. PROC. ANN. art. 46.02(3)(g) (Vernon 1979), which prohibits the use of statements made during the course of the examination in the *guilt* phase of the trial, thus impliedly permitting their admission at the punishment phase of the trial.

Petitioner notes that the only Fifth Circuit opinion dealing with the retroactivity of *Smith* (and not appealed to this Court) erroneously held "only a decision which establishes a new principle of law need be considered for prospective application. A decision which merely restates existing law to a set of facts different from those which gave birth to the original principle is given retroactive application." *Battie v. Estelle,* 655 F.2d 692, 697, (5th Cir. 1981). The Court in *Battie* held *Smith* merely applied already fixed principles to a new factual situation and gave *Smith* retroactive effect based on that finding. Not only did the three judge panel incorrectly hold *Smith* not to be "new", it engaged in that analysis at the threshold of its inquiry instead of as a part of the second criteria, reliance. Thus the analysis used by the *Battie* panel was incorrect. The correct standard of analysis is found in *Stumes* and in *Stumes* the newness of a decision is simply a part of the reliance analysis. *See Shea v. Louisiana.*

Effect on administration of justice

In *Stumes* the Court held it could "only guess" at the number of cases where *Edwards* might make a difference. The effect on the administration of justice of the retroactive application of *Smith* however can be "guessed at" with more confidence: one Texas psychiatrist alone has testified in several hundred cases. *Smith v. Estelle,* 445 F.Supp. 647, 653 n.7 (N.D. Tex. 1977). If the Court of Criminal Appeals is allowed to apply *Smith* retroactively and by rote (see next Question), the criminal justice system will be substantially disrupted. To incorrectly apply

Smith retroactively is to put an unnecessary burden on the victim witness and the State in retrying a case, the events of which took place over 10 years ago. The burden is especially unnecessary in this particular case because the accuracy of the fact finding process is not implicated: the accused was thoroughly warned by his counsel not to talk to any psychiatrist since the interview would be used against him at trial. There has never been any doubt as to the accuracy of Respondent's conviction in the face of the overwhelming evidence of his guilt. The facts brought out at the guilt phase of his trial alone were sufficient to support the imposition of the death sentence.

Retroactive application of *Smith* "would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Johnson v. New Jersey,* 86 S.Ct. at 1780.

Summary

It is clear that the criteria reiterated in *Stumes* when applied to *Smith* mandate a prospective application only. At the very least, *Smith* should not be applied in collateral attacks on convictions in which direct appeal was exhausted long before *Smith* itself was decided. Since this Court has never ruled on the retroactivity of *Smith* it should do so now.

II.

The record reflects that defense counsel fully warned Respondent not to talk to any psychiatrist and that the interview results would be used against him at trial; there was no violation of the requirements of *Estelle v. Smith.*

The Texas Court of Criminal Appeals held that the Respondent had not received adequate warnings of his Fifth

Amendment rights under *Estelle v. Smith.* While recognizing that defense counsel advised Respondent not to talk to a court-appointed psychiatrist, the Court concluded, "Advising a client not to talk is *not* the same as informing him at the beginning of interrogation that he has a 'constitutional right not to answer the questions put to him.' " *Ex parte Chambers,* No. 69,260 *slip op. at 3.* This holding is incorrect because Respondent received adequate warning of his Fifth Amendment rights from defense counsel.

The findings on Respondent's application for writ of habeas corpus, which were not challenged by the Court of Criminal Appeals, establish the following facts. Prior to the examination, defense counsel and Respondent were informed by the trial court that Dr. James Grigson would be appointed to examine the Respondent. During their representation of Respondent, and prior to the interview, defense counsel admonished Respondent that he should not talk to any "psychiatrist" about the case or the charges against him. Defense counsel told Respondent that any interview he might give to a psychiatrist could be used against him. Finally, counsel informed Respondent that the State might use the interview at the punishment phase of trial to convince the jury to assess the death penalty. Findings of Fact and Conclusions of Law (Appendix, p. ....).

Estelle v. Smith does not mandate that any particular person deliver the Fifth Amendment warnings to the defendant. Indeed, *Smith* requires only that the defendant be informed that "the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death" and that "he had a constitutional right not to answer the questions put to him." *Estelle v. Smith,* 451 U.S. 467.

Defense counsel informed Respondent both of the fact of the upcoming psychiatric examination and its probable effect on his

defense if he spoke to Dr. Grigson. In fact, counsel informed Respondent that if he participated in an interview with a psychiatrist, the evidence obtained there would be used against him to convince the jury to assess the death penalty. Although counsel apparently did not inform Respondent that he had a *constitutional* right to refuse to speak with the psychiatrist, he did inform Respondent of the nature and consequences of the interview and told him not to talk to the psychiatrist. This should be adequate warning of the Respondent's rights. Emphatically, this is not a case where Respondent was made the "deluded instrument of his own execution." *Estelle v. Smith,* 451 U.S. 462.

The Court of Criminal Appeals' holding on this issue is erroneous and should be overturned.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

EX PARTE RONALD CURTIS CHAMBERS
NO. 69,260

Habeas Corpus Application
from DALLAS County

OPINION

This is a post-conviction habeas corpus application filed pursuant to Art. 11.07, V.A.C.C.P. The application was ordered filed and set for submission "on the allegations that the admission of Dr. Grigson's testimony violated the Applicant's rights under the Fifth and Sixth Amendments to the United States Constitution."

Petitioner was convicted of capital murder and the death penalty was assessed. On appeal the conviction was affirmed. Chambers v. State, 568 S.W.2d 313. It is now contended that the psychiatric testimony used during the punishment phase of the trial was improperly obtained through an interview of appellant by Dr. Grigson without appellant having been advised of his Fifth Amendment privilege. Reliance is placed on Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359, which was decided after appellant's trial and appeal. In *Smith* the Court held:

> "The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the

crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a post-arrest custodial setting. During the psychiatric evaluation, respondent assuredly was 'faced with a phase of the adversary system' and was 'not in the presence of [a] person [ ] acting solely in his interest.' [*Miranda v. Arizona,* 384 U.S. 436] at 469, 16 L.Ed.2d 694, 86 S.Ct. 2602, [at 1625] 10 Ohio Misc. 9, 36 Ohio Ops. 2d 237, 10 ALR3d 974. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.

"The Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,' *Counselman v. Hitchcock,* 142 U.S. 547, 562, 35 L.Ed. 1110, 12 S.Ct. 195 [197] (1982), and the privilege is fulfilled only when a criminal defendent is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.' *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489 [1493,] 12 L.Ed.2d 653 (1964). We agree with the Court of Appeals that respondent's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase."

When the district court originally ruled on the application for habeas corpus, it found appellant had not made a trial objection on the matter, and alternatively found that Estelle v. Smith should not be given retroactive application. On the basis of these findings the district court recommended that relief be denied.

This Court in other post-*Smith* cases involving trials occurring before the *Smith* decision has found the failure to object did not constitute a waiver, and has given retroactive application to the

Smith decision. Mays v. State, 653 S.W.2d 30, Ex parte Demouchette, 633 S.W.2d 879. We therefore rejected the findings upon which the district court recommended that relief be denied. The record before us, however, did not clearly reflect whether or not the requirements of Estelle v. Smith were violated in this case. We therefore directed the district court to conduct a hearing to develop the facts on the matter, and then to enter findings of fact. A hearing has been held and the record and new findings by the trial court have been received by this Court.

In again recommending that relief be denied, the trial court relies on the fact that during consultation with petitioner, at some indefinite date before he was interviewed by Dr. Grigson, his trial attorneys advised him to speak to no one except counsel, and specifically instructed him not to talk to any psychiatrists because such evidence could be used against him. We do not agree that such consultation with counsel at some indefinite date prior to the interview with Dr. Grigson satisfies the requirements of Estelle v. Smith, supra. Advising a client not to talk is *not* the same as informing him at the beginning of interrogation that he has "a constitutional right not to answer the questions put to him." Estelle v. Smith, supra. The testimony of Dr. Grigson at the hearing in the trial court is uncontradicted: petitioner was not advised that he had a constitutional right not to answer the questions put to him by Dr. Grigson. See *Mays*, supra.

Relief is granted. The conviction is set aside and petitioner is ordered remanded to custody of the Sheriff of Dallas County to answer the indictment pending against him in Cause No. F75-4282-K.

It is so ordered.

ODOM, Judge

(Delivered December 5, 1984)
En Banc

EX PARTE RONALD CURTIS CHAMBERS
No. 69,260

Habeas Corpus Application
from DALLAS County

CONCURRING OPINION

Applicant was convicted in 1976 of capital murder. In this writ of habeas corpus he challenges the conviction on the basis that he was deprived not only of his Fifth Amendment right as elucidated in the majority opinion, but also of his Sixth Amendment right to counsel. While I concur with the judgment of the Court reversing applicant's conviction, I am also of the opinion that his Sixth Amendment rights were clearly violated.

The evidence adduced at the evidentiary hearing was uncontradicted that applicant had both appointed and retained counsel at the time that Dr. Grigson was appointed to evaluate applicant. The record is also undisputed that Dr. Grigson evaluated the applicant on the very same day that the trial judge ordered him appointed and that applicant's lawyers were not given advance notice that Dr. Grigson would evaluate their client; nor were counsel given the opportunity to consult and advise applicant regarding Dr. Grigson's appointment and evaluation. Finally, applicant carried his burden in showing that counsel was unaware that Dr. Grigson's appointment and evaluation would encompass the issue of petitioner's "future dangerousness".

The United States Supreme Court in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) unanimously held that a person under indictment for capital murder, who has counsel representing him, is entitled under the Sixth Amendment to consult with his attorneys prior to any psychiatric evaluation. Under the Supreme Court's holding in *Smith*, counsel

representing a capital defendant is entitled to be made aware of a pending psychiatric evaluation and to advise and prepare his client prior to any evaluation occurring. *Estelle v. Smith*, supra, at 476, 1979. (concurrence, Rehnquist, J.). The facts in this case are indistinguishable from *Smith* insofar as petitioner's Sixth Amendment claim is concerned.

This Court in capital murder cases has uniformly followed the teachings of *Smith*. Ex parte Demouchette, 633 S.W.2d 879 (Tex. Crim. App. 1982); Fields v. State, 627 S.W.2d 714 (Tex. Crim. App. 1982); Mays v. State, 653 S.W.2d 30 (Tex. Crim. App. 1983). There is no question but that *Smith* is to be applied retroactively. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981); Cf. *Fields*. supra, (McCormick, J. dissenting.).

The issue that requires further development in the majority opinion is whether the applicant has in fact waived any constitutional error by failing to timely and properly object at trial to the admission of the evidence in question. This Court has, in the past, not applied a contemporaneous objection rule to this type of error. See *Demouchette*, supra, *Fields*, supra, and *Mays*, supra. Recently, however, this Court has applied a contemporaneous objection rule in a non-capital direct appeal. Parker v. State, 649 S.W.2d 46 (Tex. Crim. App. 1983).

In *Parker*, supra, Presiding Judge Onion applied what he perceived to be a "waiver of constitutional error" rule enunciated by the United States Supreme Court in Engle v. Isaacs, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), and held that the fact that an objection may have been futile at the time of Parker's trial, such futility did not necessarily constitute cause for Parker's failure to object.

In *Engle v. Isaacs*, supra, the Supreme Court held that before a federal court exercises its habeas corpus jurisdiction pursuant

to 28 U.S.C.A. 2254, interests of comity demand that a petitioner demonstrate "cause and prejudice" if he has failed to follow State procedural rules, such as failing to timely object. If a federal court finds that there has been a "state procedural default" than a petitioner must demonstrate 'cause and prejudice' for the default. In *Engle* the petitioner argued that any objection on his part would have been futile; the Supreme Court rejected the futility of an objection as "cause". However the Court specifically left open the question of whether the novelty of a constitutional claim would ever establish "cause". *Engle*, supra, at 130, 1573.

The question left open in *Engle* was answered just last term in Reed v. Ross, ... U.S. .... , 104 S.Ct. 2901, ...L.Ed.2d. ..... (1984). In *Reed*, supra, the United States Supreme Court established that, *as far as exercise of federal habeas jurisdiction by a federal court reviewing a state criminal conviction, "cause" is established when the novelty of a constitutional right could not reasonably have been known by competent counsel at the time of trial.* (Emphasis added). That Court specifically held "that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." Id., at 2910.

I submit that under the Supreme Court's analysis, applicant in the case sub judice would have a forum in federal court. The constitutional violation here challenged could not reasonably have been known to counsel at the time of trial since it was not known right until six years after the trial.

Of equal significance to this writer is *this* State's own procedural default rule. While the teachings of *Engle* and *Reed* may be instructive, they are in no way binding on this Court. The rules enunciated in *Engle* v. *Isaacs* and *Reed* v. *Ross* concern the exercise of federal habeas jurisdiction once a State procedural

default has been shown. See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d. 594 (1977). I do not interpret these cases as attempting to impose a federal procedural waiver standard to be used by State courts.

This Court has for at least twelve years held that a defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right had not been recognized. Ex parte Taylor, 484 S.W.2d 748 (Tex. Crim. App. 1972); Ex Parte Sanders, 588 S.W.2d 383 (Tex. Crim. App. 1979); Ex Parte Casarez, 508 S.W.2d 620 (Tex. Crim. App. 1974); Boulware v. State, 542 S.W.2d 677 (Tex. Crim. App. 1976); Cuevas v. State, 641 S.W.2d 558 (Tex. Crim. App. 1982). In view of these cases decided by this Court and in view of the extension by the Supreme Court of the doctrine in *Engle v. Isaacs* to its current posture in *Reed v. Ross*, I would reaffirm the holding in *Cuevas*, supra, that "where a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver", and I would overrule *Parker*, supra, to the extent that it is in conflict.

With the foregoing in mind, I concur with the judgment of the Court.

Campbell, Judge

Delivered December 5, 1984

En Banc

W. C. Davis, Clinton, McCormick, Teague, Miller, JJ., join this opinion as well as the majority opinion.

WRIT NO. 7929
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

EX PARTE RONALD CURTIS CHAMBERS
Habeas Corpus Application from Dallas County

ORDER

On this day came to be considered the application for post conviction writ of habeas corpus filed by the applicant in Criminal District Court Number 4 of Dallas County pursuant to Art. 11.07, V.A.C.C.P., and it is hereby ordered that such application shall be filed and set for submission to the Court on March 21, 1984, without oral argument, on the allegations that the admission of Dr. Grigson's testimony violated the applicant's rights under the Fifth and Sixth Amendments to the United States Constitution. We find no merit to the other allegations raised in the application.

It is further ordered that the execution of the applicant, which has been ordered by the trial court to be carried out on March 30, 1984, is hereby STAYED and POSTPONED pending review and final disposition by this Court of this application in accordance with the provisions of Art. 11.07, V.A.C.C.P.

It is so ordered this 19th day of March, 1984.

Per Curiam

En Banc

CCA WRIT NO. 69,266
STATE WRIT NO. W75-4282-K

EX PARTE	**§ In the Criminal**
	§ District Court No. 4 of
RONALD CURTIS CHAMBERS	**§ Dallas County, Texas**

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR WRIT OF HABEAS CORPUS

This Court having held a Writ hearing pursuant to the Texas Court of Criminal Appeals Order No. 69,260 and considering the issues presented in said Order, makes the following Findings of Fact and Conclusions of Law:

HISTORY OF THE CASE

Applicant was convicted on a plea of not guilty of the offense of Capital Murder and sentenced to Death in Cause No. F75-4282-K. Jury selection began July 7, 1975. Trial on the merits was conducted July 17-19, 1975. Applicant was represented by the Honorable Sam Hudson, retained counsel of record at trial, and by the Honorable Steve Halsey, court-appointed counsel at record at trial.

Applicant's case was affirmed on appeal. *See Chambers v. State,* 568 S.W.2d 313 (Tex. Crim. App. 1978). The United States Supreme Court denied Applicant's Petition for Writ of Certiorari. *See Chambers v. Texas,* 440 U.S. 928, 99 S.Ct. 1264, 59 L.Ed.2d 584 (1979).

Applicant subsequently filed two post-conviction Applications for Writ attacking the instant case, to-wit: W-79-40008-K and W-80-40049-K. The first Writ was denied as

Writ No. 7929, while the second Writ was denied in a published opinion styled *Ex parte Chambers,* 612 S.W.2d 572 (Tex. Crim. App. 1981).

In November of 1981, Applicant petitioned the United States District Court for the Northern District of Texas, Dallas Division for habeas relief. Ultimately, said Cause No. CA-3-81-1953-R was dismissed without prejudice for failure to exhaust available State remedies.

On January 30, 1984, this Court ordered Applicant's execution by injection on March 30, 1984. On February 29, 1984, Applicant filed the instant Application for Writ of Habeas Corpus as well as a Motion to Stay Execution. The State filed its Response to both. This Court recommended that the Writ be denied, and that the execution not be stayed. On March 19, 1984, the Texas Court of Criminal Appeals in Per Curiam Writ No. 7929 ordered the Writ set for submission and granted Applicant's stay of execution based upon his Motion to Stay Execution which had been filed with the Texas Court of Criminal Appeals. On March 28, 1984, the Texas Court of Criminal Appeals in Per Curiam Opinion No. 69,260, ordered that this Court conduct an evidentiary hearing on *Estelle v. Smith* issues. It further ordered that the stay of execution remain in effect pending final disposition of the Application for Writ. On May 21, 1984 this Court held an evidentiary hearing as ordered.

LAW APPLICABLE

The Writ hearing was ordered and was held on *Estelle v. Smith,* 451 U.S. 454, 68 L.Ed.2d 359 (1981), issues. The Texas Court of Criminal Appeals raised these issues in the context of psychiatric testimony given against this Applicant at the punishment phase of this trial. Dr. Grigson, a psychiatrist, interviewed Applicant before trial. Based upon the interview, he

testified at the punishment phase of Applicant's death penalty case that there was probability that Applicant would commit criminal acts of violence that would constitute a continuing threat to society. This is the second special issue involved in a determination of whether death is a proper punishment.

Estelle v. Smith, supra, holds that when a psychiatrist interviews a defendant pre-trial and the psychiatrist subsequently testifies at the punishment stage of the trial using the remarks made by the defendant during the interview, then there must have been compliance with both the Fifth Amendment and the Sixth Amendment. The Fifth Amendment requires that the defendant must have been told that when the psychiatrist questioned him, he had a right to remain silent and that any statement he made could be used against him at the punishment portion of the trial. The Sixth Amendment rights require that defense counsel must have been notified in advance of the fact of the psychiatric examination and that it would cover the issue of the defendant's future dangerousness.

The main concern of *Estelle v. Smith, supra,* is the Fifth Amendment rights. Of course, a defendant may waive both his Fifth Amendment rights and his Sixth Amendment rights. *Johnson v. Zerbst,* 304 U.S. 458,464, 82 L.Ed.2d 1461, 58 S.Ct. 1019 (1938); *Mays v. State,* 653 S.W.2d 30 (Tex. Crim. App. 1983). There is a presumption againt waiver, yet waiver may be shown under this case law if it fully knowing and voluntary. Furthermore, in that *Estelle v. Smith, supra,* emphasizes the Fifth Amendment rights as the rights of prime importance, the case makes it clear that if the rights are fully knowingly and voluntarily waived, Applicant may also be said to have waived his Sixth Amendment rights.

Lastly, it is very important to note that with respect to a post-conviction Application for Writ as well as an evidentiary

hearing thereon, the defendant bears the burden of proof. *Ex parte Alexander,* 598 S.W.2d 308 (Tex. Crim. App. 1980). *Johnson v. Zerbst, supra,* makes it clear that this principle of burden of proof applies to exactly the kind of case involved with respect to this Applicant. Thus, this Applicant must prove that he did not waive his Fifth Amendment rights as well as his Sixth Amendment rights. Involved in this is the fact that the defendant/this Applicant must show that he did not waive his Sixth Amendment rights by a fully knowing and voluntary waiver of his Fifth Amendment rights.

ISSUES INVOLVED IN DETERMINATION OF COMPLIANCE WITH ESTELLE V. SMITH

1. Whether or not Applicant was given the warnings required by the Fifth Amendment as noted in *Estelle v. Smith.* If the warnings were given, when were the warnings given and how were they phrased. Did Applicant understand the warnings. If he was not given the warnings, do any improprieties exist.

2. Whether or not counsel for Applicant was told of the interview and that it would encompass future dangerousness or punishment. If counsel was told, when was he told and how were the admonishments to him phrased.

3. Whether the Fifth Amendment prong was met.

4. Whether the Sixth Amendment prong was met.

5. If the Sixth Amendment prong was not met, whether or not this prong was waived.

FINDINGS OF FACT

1. Applicant committed the offense of capital murder on April 11, 1975. (R. I-2; "R.I." will represent the appellate transcript of the original trial). Applicant was arrested on the following day, April 12, 1975. (R. II-107; "R. II" will represent the Writ hearing Statement of Facts). Sam Hudson was retained to represent Applicant on April 15, 1975. (R. II-79). On April 29, 1975, the Court appointed Steve Halsey and Tom Mills to represent Applicant. (R. I-6). It was only very shortly after the appointment of these two attorneys that this Court learned that Sam Hudson was retained; therefore, it withdrew both appointments. (R. II-52-53,69). Immediately after withdrawing both appointments, this Court determined that Applicant needed a second attorney to represent him in this serious capital murder case, that he could not afford a second attorney, and that such would need to be appointed; therefore, this Court appointed Steve Halsey. (R. II-79-80,85,104-105). Mr. Halsey was re-appointed by early May of 1975.

On June 23, 1975, a pre-trial hearing was held in open Court in this case with the State's attorney, Douglas Mulder, both of Applicant's attorneys, and Applicant present. (R. I-4); (R. II-70-71,96-97). On June 27, 1975, the State presented its Motion to Request Appointment of Psychiatrist to have Applicant examined on the questions of present competency and sanity at the time of the offense. (R. I-96; R. II-15-16). On this same day of June 27, 1975, the Court signed an order ordering Dr. Grigson, a psychiatrist, to examine Applicant on competency, sanity, and the danger to Applicant in his staying in the jail if Applicant was mentally ill. (R. I-85; R. II-15-16). Dr. Grigson then examined Applicant on this same day, June 27, 1975. (R. II-15-16). Subsequently, Dr. Grigson testified at punishment based upon the interview. Applicant was properly given his Fifth Amendment warnings.

Sam Hudson and Steve Halsey told Applicant at several points during the representation of him, and prior to Dr. Grigson's interview, that he was charged with capital murder, that this was a serious case, and that he was not to talk to anyone except them, his attorneys, about the case and the charges against him. (R. II-40-43,55-59). Steve Halsey stressed this advice by telling Applicant not to talk to cellmates, visitors, police officers or any "psychiatrist" about the case or charges against him. (R. II-58-59). Furthermore, Steve Halsey told Applicant that such people could be used against him in his capital murder case.

Additionally, Steve Halsey told Applicant that any interview he might give a psychiatrist could be used against him in his capital murder case. (R. II-59). Steve Halsey was concerned about the use of a psychiatrist at punishment to obtain the death penalty due to Dr. Grigson's unexpected testimony in such a manner on a prior death penalty case in which Mr. Halsey had been involved. (R. II-59-63). Steve Halsey told Applicant that either Dr. Grigson or Dr. Holbrook, psychiatrists, would likely come up to interview him. (R. II-62-63). He told Applicant that they would attempt to obtain personal information and ask him about the capital murder case, yet he must not talk to the psychiatrists. (R. II-62-63). He further told Applicant that he must not talk to the psychiatrist because the State would use the interview at the punishment phase in order to prove up the State's case and convince the jury to assess the death penalty. (R. II-62-64).

The time that all of these warnings were given is unclear, other than the fact that they were given prior to the Dr. Grigson examination. (R. II-55-65,69-70). To the extent of the lack of clarity, such should be held against Applicant who has the burden of proof. Yet what is clear is that the Applicant was given the warnings at a time and in such a manner that he realized that he had a right not to talk to the psychiatrist and that he furthermore realized exactly how his interview could be used against him.

Applicant completely understood his Fifth Amendment rights. Many of the warnings were repeated to Applicant. The warnings were all emphasized. It is clear for several reasons that Applicant understood these warnings. First, his attorneys believed that he had understood all of their warnings. (R. II-41-65-66). Second, he was given repeated *Miranda* warnings at the time of his arrest, at various points in his incarceration, at the time he was magistrated, and at the time he was asked if he wished to make a statement. (R. II-106-122). He told these officers that he understood exactly what they said and demonstrated such when he told the officer wishing to take the statement that he did not have to talk to anybody but his lawyer. (R. II-112-113). Hence, when Applicant was told by his attorneys not to talk to anyone including "psychiatrists," and the reasons for such were explained in depth, it is clear that Applicant understood these warnings.

No improprieties are shown by Applicant's attorneys in terms of warnings given by them to Applicant. No improprieties are shown by Dr. Grigson. He did not warn Applicant because warnings were not required to be given by a psychiatrist to a defendant in this posture at that time. (R. II-18). Dr. Grigson did not lead Applicant into responding during the interview, and Applicant freely and voluntarily answered each question asked him by Dr. Grigson. (R. II-22). There are no improprieties on the part of the State with respect to the psychiatric testimony. Doug Mulder, in fact, intended to use a hypothetical because he did not believe Applicant, whom he assumed had been warned by his attorneys, would talk to Dr. Grigson. (R. II-98-99). First, Doug Mulder wanted to resolve in his own mind whether or not Applicant was sane and competent to stand trial in that he did not wish these issues raised in the middle of a death penalty case. (R. II-93-94). Second, if he did use a hypothetical with Dr. Grigson, he wanted Dr. Grigson to at least have attempted to talk to Applicant so that Applicant's attorneys could not on

cross-examination of the hypothetical point out that it would have been better if the psychiatrist had personally interviewed Applicant. (R. II-99). In fact, a substantial hypothetical was posed to Dr. Grigson at the Writ hearing, which hypothetical was totally supported by the record and not based in any fashion upon the psychiatric interview. Dr. Grigson testified based upon this hypothetical in support of the same second special issue involved in the punishment phase of a death penalty — "future dangerousness".

3. The next issue involves the question of Applicant's Sixth Amendment rights. In other words, whether or not Applicant's attorneys were told that the psychiatric interview would encompass future dangerousness or punishment. In April or early May of 1975, Sam Hudson was told by Doug Mulder that he would petition the Court to appoint a psychiatrist to examine Applicant on sanity and competency, asking Mr. Hudson if he had preference of either Dr. Holbrook or Dr. Grigson. (R. II-92-94). Mr. Hudson was never given notification as to the exact day or time of the psychiatric interview. Steve Halsey testified that his recollection was that he knew of Dr. Grigson's interview only after it occurred, yet he was not absolutely certain on this point. (R. II-53). J. A. Snow, court-coordinator, testified that he remembered talking to Steve Halsey and informing him of Dr. Grigson's appointment to interview Applicant. (R. II-125). He indicated that he told Mr. Halsey this within 20 or 30 minutes after telling Dr. Grigson of the appointment and Dr. Grigson then telling him that he would soon go to see Applicant. (R. II-125-129). It is, thus, unclear whether Mr. Snow's warning came before the examination, during the examination, or after the examination. Lack of clarity on this point should be held against Applicant, who has the burden of proof.

At the June 23, 1975, Pre-trial hearing four days before the psychiatric interview —, Doug Mulder, both of Applicant's

attorneys, and Applicant were present in court. (R. II-96-97). It was at that time that Doug Mulder requested the appointment of a psychiatrist on sanity and competency issues, yet this Court told him that it required a written motion. (R. II-96-97). All parties were aware of this request.

What is clear is that Applicant's attorneys were aware that there would be a psychiatric examination prior to the actual examination. Yet it is also clear that they were not told that it would encompass any "punishment issues" or the issue of "future dangerousness."

Lastly, Sam Hudson did see a copy of the Motion for psychiatric appointment and the Order appointing. (R. II-45). He saw these a day or two after the examination. (R. II-45). Additionally, he saw a copy of Dr. Grigson's report in the trial jacket in advance of trial. (R. II-79-80). Both of Applicant's attorneys knew that Dr. Grigson would testify and knew what he would testify to prior to his actual testimony. (R. II-47,67).

CONCLUSIONS OF LAW

1 Applicant was fully and adequately warned of his Fifth Am ıdment rights as required by *Estelle v. Smith, supra.* He waived these rights in the manner required by *Johnson v. Zerbst, supra; Mays v. State, supra;* and *Heflin v. State,* 647 S.W.2d 58 (CA – Austin – 1982 – P.D.R. ref'd.). Applicant understood his Fifth Amendment rights and fully voluntarily and knowingly waived them. By waiving them in this manner, he also waived his Sixth Amendment rights. *Estelle v. Smith, supra; Mays v. State, supra;* and *Ex Parte Alexander, supra.*

2. The Court finds that the Applicant has not been denied any rights guaranteed him by the Constitution of the United States or the Constitution of Texas.

3. The Court finds that the Applicant is lawfully restrained and confined by Respondent.

4. The Court is of the opinion that the Applicant's Application for Writ of Habeas Corpus is totally without merit and recommends that the same be denied.

ORDERS OF THE COURT

In implementing the Court's Findings of Facts and Conclusions of Law, the Clerk will:

1. Prepare a transcript of all papers in this Cause and transmit the Court's Findings and Order, including the indictment, judgment, sentence, 1984 Texas Court of Criminal Appeals' Stay of Execution, March 28, 1984 Order of the Texas Court of Criminal Appeals mandating this Writ hearing, both side's proposed Findings/Conclusions and briefs, the trial docket sheets, and other exhibits and evidentiary matter filed in the trial records of this Cause, to the Court of Criminal Appeals as provided by Article 11.07, V.A.C.C.P.

2. Send a copy of these Findings of Fact and Conclusions of Law, and the Order thereon, to the Applicant and his counsel by depositing same in the U.S. Mail.

SIGNED AND ENTERED this the 20th day of June, 1984.

/s/ JOHN MEAD

Judge

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE
Austin, Texas, March 27, 1985

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the State's Motion for Rehearing in Cause No. 69,260

EX PARTE: RONALD CURTIS CHAMBERS
vs.
THE STATE OF TEXAS Appellee.

Sincerely yours,

THOMAS LOWE, Clerk

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
JUL 12 1985
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 84-1850

THE STATE OF TEXAS,

Petitioner

v.

RONALD CURTIS CHAMBERS,

Respondent

On Petition For A Writ of Certiorari To The
Court of Criminal Appeals
Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

VINCENT W. PERINI
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Dallas, Texas 75219
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STATEMENT OF THE CASE

Respondent was convicted of capital murder and sentenced to death in a trial before a jury after a plea of Not Guilty on July 7, 1975, in the Criminal District Court No. 4 of Dallas County, Texas, Cause No F-75-4282-K. In the punishment phase of the trial, the State's only witness was Dr. James Grigson, a psychiatrist who had interviewed Applicant to determine sanity, competency, and whether continued confinement in jail, as opposed to a hospital, would impose a danger to Respondent's mental condition. He testified that Respondent had a "sociopathic personality disorder" (Vol. VIII-2392),1 "at the very end of the scale of severity; you cannot become more severe than where he falls" (2395). Grigson was permitted to give his opinion about the probability that Respondent would commit criminal acts of violence in the future constituting a continuing threat to society.

The State produced no other evidence in the punishment phase; no criminal convictions of any kind were offered; there were never any "bad reputation" witnesses nor were any questions posed to Respondent's reputation witnesses suggesting that he had any kind of police record.

Respondent offered the testimony of family friends who had known him since he was a young child, including a minister who had been the employer of his mother, but the court would not allow him to testify whether he thought Respondent would commit similar offenses in the future.

Respondent's conviction was affirmed in Chambers v. State, 568 S.W.2d 313 (Tex. Crim. App. 1978), Cert. denied, 440 U.S. 928 (1979). On direct appeal, Respondent argued that allowing Dr. Grigson to testify concerning statements made to him by Respondent was a denial of the right to

remain silent and a denial of effective assistance of counsel. Respondent also complained on direct appeal of the lack of notice to defense counsel about the psychiatric examination and the failure of Dr. Grigson to warn Respondent that his statements could be used against him.2

1/ References to the trial court transcript are identified by the designated volume number, followed by the applicable typed page number.

2/ The Petitioners' claim in their statement of the case that Respondent alleged a violation of the requirements of Estelle v. Smith for the first time in the second habeas corpus application is dead wrong. While Respondent did not denominate the objection as "Smith" error until later in the appellate process, Respondent complained of the substantive violation in the first appellate brief filed, on direct appeal to the Court of Criminal Appeals of Texas in January 1977, using the language "effective assistance of counsel," "right to remain silent," "due process of law," and "U.S. Const., Amends. 5, 6, 8 and 14." The Texas Court of Appeals found Respondent failed to preserve the error by not making a correct contemporaneous trial objection. Subsequently, the Texas Court of Criminal Appeals held as a matter of state law that no waiver may be found where defense counsel failed to make a trial objection based upon a constitutional right that had not yet been recognized at the time of trial. Ex Parte Chambers, 688 S.W. 2d 483 (Tex. Crim. App. 1984).

NO. 84-1850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE STATE OF TEXAS, Petitioner

v.

RONALD CURTIS CHAMBERS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, RONALD CURTIS CHAMBERS, respectfully requests that this Court deny the Petition For Writ of Certiorari seeking review of the opinion of the Court of Criminal Appeals of Texas, delivered December 5, 1984, reported at 688 S.W.2d 483 (Tex. Crim. App. 1984).

REASONS FOR DENIAL OF WRIT

I.

The Dallas prosecutors' retroactivity argument presents no colorable issue warranting certiorari, for at least four separate reasons:

A. The decision of the Texas Court of Criminal Appeals is fully consistent with well-reasoned decisions of the United States Court of Appeals for the Fifth Circuit

holding Estelle v. Smith, 451 U.S. 454 (1981), retroactive. The leading Fifth Circuit opinion, Battie v. Estelle 655 F.2d 692, (5th Cir. 1981), remains as unimpeachable today under Solem v. Stumes, 465 U.S. _____, 104 S.Ct. 1338, 79 L.Ed. 2d 579 (1984), as under prior decisions of this Court.

Although the Texas courts had repeatedly ignored the Miranda v. Arizona, 384 U.S. 436 (1966),implications of prosecutors' tactics involving Doctors Grigson and Holbrook prior to 1981, the unconstitutionality of these tactics was never seriously in doubt by the federal judiciary. Smith, the first Texas capital case presenting the issue to reach a federal court, sailed through the federal system without a single judge or Justice voting for the State's position. Habeas corpus relief was granted by the district court, 445 F. Supp. 647 (N.D. Tex. 1977); a unanimous panel of the Fifth Circuit affirmed, 602 F.2d 694 (5th Cir. 1979); rehearing en banc was denied without any request for a poll, let alone any dissent, 606 F.2d 321 (5th Cir. 1979); and this Court unanimously affirmed, 451 U.S. 454 (1981).

Petitioner mistakenly places heavy reliance on Solem v.Stumes, supra, for its holding that the principal announced in Edwards v. Arizona, 451 U.S. 477 (1981), would not be applied retroactively. Neither Respondent nor the Petitioner has ever argued that the Edwards rule had any bearing on Respondent's case; Respondent never envoked his right to counsel during Dr. Grigson's psychiatric examination, because Grigson never advised Respondent that he had such a right, or that he had the constitutional right to remain silent. Thus, the petitioner's reliance is misplaced.

B. To be sure, only six Justices were willing to decide Smith on Fifth Amendment grounds; Justices Stewart, Powell, and Rehnquist did not wish to reach that question.

But the Court was unanimous on the Sixth Amendment basis for its decision, with all three opinions stating that the result was a simple and obvious application of Massiah v. United States, 377 U.S. 201 (1964). See Estelle v. Smith, supra, 451 U.S. at 469-471; id. at 474 (concurring opinion of Justice Stewart, joined by Justice Powell); id. at 474-75 (concurring opinion of Justice Rehnquist). For such a decision to be declared non-retroactive is inconceivable.

The District Attorney's contention that Smith was not "'clearly' or 'distinctly' foreshadowed" by prior law within the meaning of Solem v. Stumes, supra, 79 L.Ed. 2d at 591, misconceives both decisions. In Stumes the holding of Edwards v. Arizona, supra, was held to have "establish[ed] a new rule" (79 L.Ed. 2d at 589), not clearly foreseeable, because it innovated a "per se approach" (ibid) after this Court "had several times refused to adopt per se rules governing the waiver of Miranda rights" (id. at 590). The Court's Sixth Amendment decision in Smith involved no similar innovation departing from a course of previous precedent. It simply applied Massiah, according to Massiah's plain language and unmistakable purport, in a factual setting where the application of the Massiah rule was clear. After Hoffa v. United States, 385 U.S. 293 (1966), and Kirby v. Illinois, 406 U.S. 682 (1972), it was hornbook law that the fact of indictment alone triggered a criminal defendant's Sixth Amendment right to counsel in any confrontation with state-instigated agents. Massiah himself had been confronted not with a police interrogator but with an undercover agent; Massiah was not in custody at the time of the confrontation, but at large on bail. The application of Massiah to an indicted defendant questioned in custody by a state-appointed psychiatrist is simply a fortiori. To claim that it was not clearly and distinctly foreshadowed by

Massiah is disingenuous.[1]

C. The Texas Attorney General's office, which did not seek certiorari in Battie, recently advanced in the Fifth Circuit a non-retroactivity argument identical to the one made by the Dallas prosecutor in this case. The Court of Appeals, finding the claim ludicrous, rejected it one day after oral argument:

> While Estelle v. Smith may have been a new and clear break with the past in the view of Texas courts, we do not think the Supreme Court so regarded it . The Court saw the psychiatric testimony on future dangerousness, without prior warning or advice of counsel, as violating clearly established constitutional law. It was a unanimous judgment, three [opinions] of the Justices saying that the 1964 case of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 2d 246 (1964), decided the matter. Smith [did not] . . . establish [ ] a new principal of constitutional law.

Muniz v. Procunier, 760 F.2d 588, 590 (5th Cir. 1985).

D. Finally, it is important to note that rejection of the Dallas prosecutor's retroactivity argument will have no significant "disruptive effect on the administration of Justice" in Texas, Solem v. Stumes, supra, 79 L.Ed. 2d at 591. In the nearly four years since Smith was decided and held retroactive in Battie, virtually every Texas death row inmate with a Smith claim has already been granted relief. According to the records of the NAACP Legal Defense Fund, at least nineteen have had the death sentences vacated by state or federal courts on the basis of Smith, and at least seven more have had their sentences commuted by the Governor at

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1/ The fact that the Texas Court of Criminal Appeals blindly refused to obey this basic principal of constitutional law for many years with respect to the activity of Dr. John Holbrook and James P. Grigson, e.g., Gholson v. State 542 S.W.2d 395, 400, Tex. Crim. App. 1976, hardly triggers retroactivity analysis.

the prosecutions' request in advance of court decisions. (See Appendix A, infra.)2

Only one Smith case is pending in the Fifth Circuit (Jones v. Procunier, No. 84-1401) and two more are in the federal district court for the Eastern District of Texas, plus Muniz v. Procunier, supra. Just about every death sentence that could be vacated under Smith has been vacated already. If the State has any information to the contrary, it has not said so: in neither this case nor Muniz have the prosecutors identified from their records a single pending case which would be affected by declaring Smith non-retroactive at this late date. The impact of denying certiorari is virtually nil.

II.

The Dallas prosecutors' assertion that the evidence showed counsel was notified and Respondent warned about Dr. Grigson is shamelessly misleading, and certiorari would turn into an argument on the facts.

A. The decision of the Texas Court of Criminal Appeals is a consistent application of this Court's ruling in Estelle v. Smith as evidenced by the testimony of Doctor

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2/ The Governor of Texas commuted over thirty death sentences in the wake of Smith and Adams v. Texas, 448 U.S. 38 (1980). It is quite possible that more than seven involved Smith issues. The Legal Defense Fund's list is conservatively limited to cases in which opinions or court papers on file at the Fund conclusively establish the presence of a Smith claim.

There may be other Texas death cases in which psychiatrists testified for the prosecution at the penalty phase hypothetically (i.e., without examining the defendant), or at the guilt stage of the trial in response to an insanity defense, or at a competency trial in response to a claim of incompetence, or for some other purpose. These cases, of course, are not covered by Smith and are unaffected by the claim advanced in the certiorari petition. See Barefoot v. Estelle, 463 U.S. _____, 77 L.Ed 2d 1090 (1983): Estelle v. Smith, supra, 451 U.S. at 465-66 & n. 10.

Grigson and defense counsel developed at an evidentiary hearing specifically designed to explore the issue. In particular, the Texas Court of Criminal Appeals found "[t]he testimony of Dr. Grigson at the hearing in the trial court is uncontradicted: petitioner was not advised that he had a constitutional right not to answer the questions put to him by Dr. Grigson." Ex Parte Chambers, 688 S.W. 2d 483 at 485 (Tex. Crim. App. 1984).

Petitioner argues that the Fifth Amendment requirements were met by defense counsel. In effect, they urge that remarks which defense counsel may have made to Respondent satisfy Smith, Miranda, and the Fifth Amendment.

None of defense counsel's remarks provided Respondent with adequate warning of his constitutional rights; the record documents the vagueness and ambiguity of their statements.3

Halsey stressed that his remarks regarding a psychiatrist were grouped together with references to cell mates, visitors and police, and he discussed a psychiatrist "in not great detail but some detail" (E.H. 59-60). Hudson admitted that his "instructions and explanations" were no more specific (E.H.50); he only told Respondent not to speak with anyone but his attorneys about the case (E.H.41). He never warned Respondent not to talk with Grigson or the consequences. Hudson specifically testified that he did not give his warnings several times; he gave Respondent this general warning just once,at a time he thought Respondent understood (E.H. 43).

3/ References to the evidentiary hearing's Statement of Facts are identified as "E.H." followed by the applicable page number. The evidentiary hearing was held before the Honorable John Mead on May 21, 1984.

Defense counsel Halsey's testimony was ambiguous in his claim that he warned Respondent. His conversation was vague, casual and ineffective in providing Respondent with the "guiding hand" that Smith requires. In Respondent's case, Halsey at best could only recall a "conversation that was more than one sentence long" (E.H. 61); yet he said he would normally warn his clients in capital cases "several times" not to talk with a psychiatrist (E.H. 62).

In Respondent's case, Halsey admitted he did not even remember mentioning Grigson's name (E.H.61); yet he claimed that he normally gave his clients the names and physical descriptions of potential psychiatrists (E.H. 63). Halsey was "almost sure" he told Respondent that anything he told a psychiatrist could be used against him (E.H. 58), but he said this in the same context as other general warnings (E.H. 59), he did not go into it in great detail (E.H. 60), it was merely "more than one sentence long" (E.H. 61), he "possibly" tied it in to special issues facing Respondent at the penalty phase (E.H. 62), and he did not recall the details of his conversation with Respondent on this point (E.H. 72). He wrote no letter to Respondent detailing the hazards of talking to a psychiatrist (E.H. 71-72).

Halsey's notes did not reflect that he discussed the hazards, or even the dates of his visits (E.H. 74). Halsey could not recall exactly when he made these comments to Respondent. It could have been one of his first visits, early in the representation or within a few days of the examination by Grigson. These general remarks could have been given up to two months prior to Grigson's examination. Clearly, Respondent received some warning concerning a

potential interview with a court-appointed psychiatrist. It is equally obvious that the warning he received was not qualitatively the type which could substitute for Miranda warnings or other procedural safeguards employed to protect an individual's privilege against self-incrimination. Thus, the Dallas prosecutor's claim that Respondent received adequate warning of his Fifth Amendment rights is meritless.

Based upon a record containing these facts, the Texas Court of Criminal Appeals correctly concluded that such consultation with counsel at some indefinite time prior to the interview with Dr. Grigson did not satisfy the requirements of Estelle v. Smith. Their decision is a straightforward application of Smith principles to Respondent's case.

B. Furthermore, the concurring opinion, which is joined by a majority of the Court, illustrates that defense counsel had no advance notice that the examination would encompass the issue of Respondent's future dangerousness:

> The record is . . . undisputed that Dr. Grigson evaluated the applicant on the very same day that the trial judge ordered him appointed and that applicant's lawyers were not given advance notice that Dr. Grigson would evaluate their client; nor were counsel given the opportunity to consult and advise applicant regarding Dr. Grigson's appointment and evaluation. Finally, applicant carried his burden in showing that counsel was unaware that Dr. Grigson's appointment and evaluation would encompass the issue of petitioner's "future dangerousness."

Ex Parte Chambers, supra at 485.

Obviously, these factual findings of the Texas Court of Criminal Appeals based upon the evidentiary hearing record discredit the Dallas prosecutor's disingenuous us observation that "[p]rior to the examination, defense counsel and Respondent were informed by the trial court that Dr. James Grigson would be appointed to examine the defendant" (Petitioner's Writ p. 10).

The State's Motion For Psychiatric Examination was

filed and Grigson appointed without a chance for defense counsel to respond. Grigson did not discuss the examination with defense counsel (E.H. 14). The only notice to defense counsel was a copy of the motion mailed to Hudson (E.H. 15). Dr. Grigson proceeded the same day to examine Respondent, rendering the mailed notice useless. Halsey recalled that no one warned, alerted or notified him in advance that any psychiatrist was going to examine Respondent for any purpose; he recalled no receipt of copies of the State's Motion and Order (E.H. 53,54, 66, 73). In fact, he was not even named on the Certificate of Service (E.H. 15, 135).

J.A. Snow, the trial court's coordinator, testified he contacted Grigson at jail to tell him of his appointment, and Grigson told Snow that he would proceed immediately to examine Respondent (E.H. 127). Snow said that he left a message with Hudson's office regarding his conversation with Grigson (E.H. 128). Snow claimed he contacted Halsey and told him that Grigson was proceeding immediately to examine Respondent (E.H. 128). Snow admitted that up to 30 minutes had elapsed between his conversation with Grigson and Halsey, and he knew of no other notice to defense counsel from any other source regarding Grigson's interview (E.H. 129). Snow's attempted "notice" to Counsel, such as it was, came too late. This Court has never held that the Smith requirements are met when a court coordinator telephones defense counsel that a psychiatrist had been appointed and was proceeding to interview the accused forthwith.

It is undisputed that the scope of the State's motion and the Court's order was for the limited, neutral purpose of determining sanity, competency and whether continued confinement in jail, as opposed to a medical facility, would pose a danger to Respondent's medical condition. Neither the motion nor order even arguably refers to future

dangerousness. (E.H. 135-36). Thus, defense counsel also had no notice of the true purpose: that the interview would range well beyond the court order. The State's failure to give notice either that Grigson's examination would encompass future dangerousness or to what end Grigson's findings could be used, clearly violated the requirements of Smith, supra. Even if this Court finds that Hudson and Halsey are deemed to have received notice of the examination, there is absolutely no evidence that they received notice that it would encompass future dangerousness. Furthermore, even assuming Snow contacted defense counsel by telephone on June 27, 1975, (E.H. 38-39, 53-54), the order for a psychiatric examination about which he was calling them was silent about future dangerousness.

In Smith, supra, this Court held, unanimously and unequivocally, that when Smith's counsel were not notified in advance that Grigson's examination would encompass the issue of future dangerousness, his Sixth Amendment rights were violated. Smith, supra, 451 U.S. at 471. The Texas Court of Criminal Appeals correctly recognized that the same is true in Respondent's case.

Respondent had a constitutional right to the guiding hand of his counsel, when faced with an impending examination, to weigh other available evidence, Grigson's biases and predelections, and possible alternative strategies. Smith, supra, citing Smith v. Estelle, 602 F.2d 694, 708 (5th Cir. 1979), and see Powell v. Alabama, 287 U.S. 45 (1932). "[O]nly after sufficient notice is given and received by counsel" can counsel "then be able to give his client 'the guiding hand of counsel.'" Mays v. State, 653 S.W.2d 30, 35 (Tex. Crim. App. 1983) (emphasis added). The Sixth Amendment was meant to provide Respondent with a constitutional guarantee that he need not stand alone

against the State at this critical stage, yet that is exactly what happened. Hudson and Halsey were likewise entitled to be made aware of Grigson's activities involving Respondent and to advise and prepare him accordingly. Smith, 451 U.S. at 475 (Rehnquist, J., concurring). The right to assistance of counsel is "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

Respondent's Sixth Amendment right to assistance of counsel was abridged when he was "not given prior opportunity to consult" with Hudson and Halsey "about his participation in the psychiatric examination." Smith, 451 U.S. at 470, n. 14 (emphasis added). Respondent had a right to be assisted by counsel in deciding whether to submit to the specific examination. Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982).

The Texas Court of Criminal Appeals correctly applied the established principles of this Court's decision in Estelle v. Smith, supra, to an almost identical fact pattern in Respondent's case. Respondent's case adds nothing unusual or unique to the pre-existing analysis. The record contains extensive testimony on the issues of warnings concerning self-incrimination, notice of the psychiatric examination, and notice of the scope and purpose of the examination by Dr. Grigson. An independent reading of the entire record compels the conclusion that the requirements of Smith, supra, were not met in that Dr. Grigson did not give Respondent his constitutionally required warnings, and that the safeguards of the Fifth Amendment were not afforded him. In light of the testimony contained in the record, no further review of these issues is warranted.

CONCLUSION

In conclusion, the Petition For Writ of Certiorari should be denied because the Texas Court of Criminal Appeals' decision below is consistent with this Court's applicable decisions. The Texas Court of Criminal Appeals' recognition that Respondent's Fifth and Sixth Amendment rights were violated does not conflict with decisions of this Court, particularly Estelle v. Smith, 451 U.S. 454 (1981). This court should not undertake a review of the facts on writ of certiorari because the ruling of the Texas Court of Criminal Appeals is not erroneous. The Petition For Writ of Certiorari should be denied for this reason alone.

Furthermore, the Texas Court of Criminal Appeals' decision extending retroactive effect to this Court's decision in Smith, supra, accords with the body of law concerning determination of retroactivity announced by this Court. The principles of Smith, supra, were clearly or distinctly foreshadowed by this Court's decision in Massiah v. United States, 377 U.S.201 (1964). As such, Smith should be applied retroactively to Respondent's case. For this reason alone the Writ should be denied.

WHEREFORE, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Texas court of Criminal Appeals in this case.

Respectfully submitted,

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APPENDIX A

Texas Capital Cases Known to the NAACP Legal Defense and Educational Fund, Inc. Involving Estelle v. Smith Issues

I. Fifth Circuit Cases

1. White v. Estelle, 720 F.2d 415 (5th Cir. 1983)
2. Green v. Estelle, 706 F.2d 148 (5th Cir. 1983)
3. Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982)
4. Ross v. Estelle, 675 F.2d 734 (5th Cir. 1982)
5. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981)

II. District Court Cases

1. Bell v. Estelle, C.A. No. B-81-909 (E.D. Tex. Jan. 17, 1984)
2. Shippy v. Estelle, C.A. No. W-81-CA-081 (W.D. Tex. Oct. 24, 1983)
3. Von Byrd v. Estelle, No. B-79-760-CA (E.D. Tex. June 9, 1983)
4. Livingston v. Estelle, No. S-77-75-CA (E.D. Tex. Jan. 6, 1983)
5. Collins v. Estelle, C.A. No. W-78-CA-91 (W.D. Tex. Sept. 13, 1982)
6. Denney v. Estelle, C.A. No. B-80-161 (S.D. Tex. Feb. 4, 1982)
7. Ferguson v. Estelle, No. W-80-CA-50 (W.D. Tex. Jan. 12, 1982)

III. Texas Court of Criminal Appeals Cases

1. Mays v. State, 653 S.W.2d 30 (1983)
2. Ex Parte English, 642 S.W.2d 487 (1982)
3. Ex Parte Demouchette, 633 S.W.2d 879 (1982)
4. Fields v. State, 627 S.W.2d 714 (1982)

5. Clark v. State, 627 S.W.2d 693 (1981)

6. Brandon v. STate, No. 59,348 (June 2, 1982)

7. Thompson v. State, 621 S.W.2d 624 (1981)

Commutations by the Governor prior to court decision in cases known to contain Smith issues

1. Jackie Osteen (June 17, 1981)

2. James Simmons (Aug. 17, 1981)

3. Magdaleno Rodriguez (Oct. 16, 1981)

4. William Hammett (Oct. 21, 1981)

5. Artie Armour (Oct. 21, 1981)

6. Doyle Boulware (Oct. 20, 1982)

7. Moses Garcia (March 22, 1983)